

1 BERNSTEIN AND POISSON
2 SCOTT L. POISSON, ESQ.

3 Nevada Bar No.: 10188

4 JAMIE H. CORCORAN, ESQ.

5 Nevada Bar No.: 11790

6 **BERNSTEIN & POISSON**

7 320 South Jones Blvd.

8 Las Vegas, Nevada 89107

9 (702) 256-4566

10 (702) 256-6280 fax

11 Jamie@vegashurt.com

12 Attorneys for Plaintiff

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Margaret A Patton, individually;

212-cv-02142-GMN-VCF

Plaintiff,

vs.

Wal-Mart Stores, Inc.; and DOES 1
through 100; and ROE
CORPORATIONS 101 through 200

Defendants.

PLAINTIFF'S RENEWED OPPOSITION TO DEFENDANT'S MOTION TO
EXCLUDE PLAINTIFF'S UNTIMELY DISCLOSED DAMAGES PURSUANT TO
FRCP 37(C)1

Comes now PLAINTIFF by and through her counsel of record JAMIE H.
CORCORAN, ESQ. and SCOTT L. POISSON, ESQ. herby files this Opposition
to Defendant's Motion to exclude Plaintiff's untimely disclosed.

1 This motion is made and based upon the points and authorities attached
2 hereto, and all the pleadings, papers, and files herein.

3
4 RESPECTFULLY SUBMITTED THIS 30 day of October, 2013
5

6
7 **BERNSTEIN AND POISSON**

8
9 
10 SCOTT POISSON, ESQ.
11 Nevada Bar No. 10188
12 JAMIE H. CORCORAN, ESQ.
13 Nevada Bar No.: 11790
14 **BERNSTEIN & POISSON**
15 320 South Jones Blvd.
16 Las Vegas, Nevada 89107
17 (702) 256-4566
18 (702) 256-6280 fax
19

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION

This is a premise liability action, arising from a slip and fall on Defendant's premises on June 11, 2011. Plaintiff was injured as a result of her fall, which to date has required Plaintiff to endure twenty-eight months of therapy and treatment, including a spinal surgery, with nineteen different medical facilities. Plaintiff is still recovering from her surgery and still undergoing treatment related to the incident.

II. BACKGROUND

Federal Rule of Civil Procedure 26(a)(1)(A)(iii) states that;

"a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered."

Federal Rule of Civil Procedure 26(e) states:

(1) *In General.* A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing;

Beginning January 30, 2013 through June 15, 2013, (the close of discovery) Plaintiff supplemented her 26(f) disclosures four times, and provided two additional supplemental disclosures after the close of discovery. During this

1 time period, Plaintiff has continued treatment with her treating physicians and
2 medical providers, including her spinal surgeon, Dr. William Smith, who
3 performed a lumbar surgery on Plaintiff on February 20, 2013.

4 Plaintiff's initial 26(f) disclosures provided to Defendant on January 30,
5 2013, included records from her spinal surgeon, Dr. William Smith, consisting of
6 dates of treatment; September 29, 2011 through October 15, 2012, which
7 consisted of her entire treatment with Dr. Smith up to that point. (See Initial 26(f)
8 Disclosures attached as Exhibit A)

9
10 Plaintiff's initial 26(f) disclosures further listed the person most knowledge
11 at Surgery Center of Southern Nevada as a witness and provided bills and
12 records from the surgery center to defendant relating to Plaintiff's treatment at
13 the facility up until that point. On February 5, 2013, Plaintiff supplemented her
14 26(f) disclosures providing information related to her upcoming surgery stating;
15

16 "Plaintiff's computation of damages to date includes her above related
17 medical specials and her continued/pending care with her spinal surgeon
18 for medical specials totaling \$84,273.70. Plaintiff will incur more medical
19 specials as she schedules her spine surgery." (See first supplement
20 attached as Exhibit B)

21
22 Plaintiff followed up with Dr. William Smith on February 20, 2012 where
23 she underwent a posterior lumbar interbody fusion. On April 12, 2013, upon
24 receipt of records from her operation, Plaintiff provided her second supplement to
25 her 26(f) disclosures including; her pre operative appointment with Radar Medical
26 Group, the operative report from the surgical facility (surgery center of Southern
27 Nevada), the billing from her surgeon, Dr. William Smith, and records from
28

1 Prosthetic Center of Excellence for a brace that was required as she recovered
2 from her operation. (See second supplement attached as Exhibit C) In her
3 second supplement plaintiff stated;

4 Plaintiff's computation of damages to date includes her above related
5 medical specials for current medical specials in the amount of
6 \$130,679.22. **At this time, since Plaintiff is recovering from spinal**
7 **surgery, it is unknown whether Plaintiff will have any future medical**
8 **expenses but is expected to incur more medical bills once she**
9 **begins physical therapy.** (Emphasis added) In addition to the economic
10 losses stated herein, Plaintiff also claims past and future noneconomic
11 damages permitted under Nevada law including physical and mental pain,
12 suffering, anguish, disability, and inconvenience.

13 In addition to providing updated medical information for her computation of
14 damages, Plaintiff also put Defendant on notice that she would NOT be making a
15 past wage loss claim

16
17 Plaintiff is not making a past wage loss claim. Since Plaintiff is still
18 recovering from spinal surgery, it is unknown whether Plaintiff will have a
19 future wage loss and/or future loss of earning capacity claim.

20
21 On June 12, 2013 Plaintiff provided her fourth supplement to her 26(f)
22 disclosures to include Plaintiff's post surgery consultation with her spinal
23 surgeon. (See fourth supplement attached as Exhibit D) Plaintiff further provided
24 Defendant the name and address of Plaintiff's post surgery rehabilitation facility,
25 whose records were not yet available.

26
27 On August 6, 2013 Plaintiff provided her 5th supplement to her 26(f)
28 disclosures. Plaintiff's fifth supplement included the one page billing statement

1 from her previously disclosed medical provider, Surgery Center of Southern
2 Nevada from her surgery. (See billing statement attached as Exhibit E) Plaintiff
3 had previously timely disclosed the operative report from Surgery Center of
4 Southern Nevada on April 12, 2013. (See Operative Report attached as Exhibit
5 F) Plaintiff's fifth supplement also included bills and records from her treatment
6 with her post surgical rehabilitation therapist, and pharmaceutical billing from July
7 22 – July 24, 2013, (See fifth supplement attached as Exhibit G)

9 At the time of Plaintiff's 5th supplement, Plaintiff had previously listed
10 Surgery Center of Southern Nevada as a treatment provider, had timely
11 disclosed all the records and bills related to her treatment at the facility prior to
12 her surgery, had provided the surgical operative report from the surgery Center
13 related to her February 20, 2013 surgery, and had provided Defendant with
14 medical authorizations to independently request Plaintiff's medical billings and
15 records. Upon receipt of the additional bill from Surgery Center of Southern
16 Nevada, Plaintiff provided her 5th supplement to Defendant.

19 Finally, on September 10, 2013 Plaintiff provided her sixth supplement, to
20 include the records and billing associated with her August 28, 2013 appointment
21 with Radar Medical Group (previously listed as a treating provider and witness).

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

III. LEGAL ARGUMENT

Federal Rules of Civil Procedure 37(c)(1), states in pertinent part, that:

If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.

The factors that may be used in determine whether a violation of a discovery deadline is justified or harmless are; 1. Prejudice or surprise to the party against whom the evidence is offered, 2. The ability of that party to cure the prejudice, 3. The likelihood of disruption of the trial, and 4. Bad faith or willfulness involved in no timely disclosing the evidence. *Manneh v. Inverness Medical Innovations, Inc.*, 2010 WL 3212129 S.D. Cal. 2010 (quoting *Lanard Toys, Ltd. V. Novelty, Inc.*, 2010 WI 1452527 at 6 (9th cir 2010))

A. THERE IS NO PREJUDICE OR SURPRISE ON DEFENDANT

1. DEFENDANT IS NOT PREJUDICED

“Disclosing a computation of damages under Rule 26(a) (1) is necessary for the opposing party to procure responding evidence, such as an expert opinion.” *In re Gorilla Companies, LLC.*, -B.R. – 2011 WL855788 at 3 (D. Ariz. 2011) citing, *Hoffman v. Const. Protective Servs., Inc.*, 541 F.3d 1175, 1179-80 (9th Cir. 2008)

1 Defendant asserts they have been prejudiced by not having the billing
2 from the surgical center, contending that, had they had the billing they would
3 have retained additional experts and would have conducted additional discovery.

4 Courts have held that, a party is not harmed where, even though an expert
5 disclosure fails to satisfy FED. R. CIV. P. 26, the party knew about the expert,
6 knew about the content of the expert's testimony, and had an opportunity to
7 depose the expert. See *Ricks v. BMEzine.com, L.L.C.*, 727 F.Supp.2d 936, 2010
8 WL 2985795 (D. Nev. 2010)

9
10 Likewise, herein, Defendant was aware throughout the process that
11 plaintiff was surgical and underwent a surgical operation. Because of this
12 knowledge, on April 5, 2013, Defendant had plaintiff undergo an Independent
13 Medical Examination. Defendant's expert completed a report after the medical
14 examination stating;
15

16 "There are not clear indications (based on the information currently
17 available) that, as a result of her fall, the claimant required the recent
18 surgery and other invasive procedures." (See Report attached as Exhibit
19 H)
20

21 On June 21, 2013, Defendant provided a supplemental report completed
22 by their retained expert after a further review of records, including all records and
23 notes related to her lumbar surgery; (See Supplemental Report attached as
24 Exhibit I)
25

26 ///

27 ///

1 1/29/2013 - Patient Questionnaire - Radar Medical Group.

2 1/29/2013 - Lab Results - Clinical Pathology Laboratory.

3 1/29/2013 - X-Ray – Chest - Matt Treinen, D.O.

4 1/29/2013 - ECG Results - Radar Medical Group.

5 2/11/2013 - Exam Notes - Radar Medical Group. These document a diagnosis of lumbar strain

6 and a plan to go ahead with the planned surgery.

7 2/19/2013 - History and Physical Notes - Surgery Center of Southern Nevada. The planned

8 surgery was a left sacroiliac joint fusion and L5-S1 posterior interbody fusion, with a laminectomy.

9 2/19/2013 - History and Physical - William Smith, M.D.

10 2/20/2013 - Registration Form - Surgery Center of Southern Nevada. The procedure was listed

11 as a left sacroiliac joint fusion and L5-S1 posterior interbody laminectomy, with a facetectomy and foraminotomy.

12 2/20/2013 - Patient Questionnaire - Surgery Center of Southern Nevada.

13 2/20/2013 - Lab Request Slip - Surgery Center of Southern Nevada.

14 2/20/2013 - Images of Spine - William Smith, M.D.

15 2/20/2013 - History and Physical -William Smith, M.D.

16 2/20/2013 - Operative Notes - William Smith, M.D. The diagnosis is listed as traumatic

17 sacroiliitis and internal disc disruption.

18

19

20

21 2/20/2013 - Operative Report -William Smith, M.D. Pre-operative diagnoses and post-operative

22 diagnoses were internal disc disruption, L5-S1; facet arthropathy with facet disruption, L5-S1;

23 traumatic left sacroiliitis. The procedure performed was described as a posterior lumbar

24 interbody fusion at L5-S1, with an OptiMesh bag, a local bone source, bone marrow aspirate through a separate incision for harvesting, continuous neuro monitoring, lumbar foraminotomy at L5, and sacroiliac arthrodesis with implants times three.

25 2/20/2013 – Discharge Summary -William Smith, M.D.

26 2/20/2013 - Prescription Slips - William Smith, M.D.

27 2/21/2013 - Telephone Encounter - Surgery Center of Southern Nevada West.

28

1 Defendant's expert had the opportunity to review all of Plaintiff's surgical
2 records including the operative report, the patient questionnaire from surgery
3 center of southern Nevada, the registration form from the surgery center of
4 southern Nevada, and records related to a telephone encounter with surgery
5 center of southern Nevada.

6
7 Based on the review of the records and the previous examination, On July
8 24, 2013, Defendant produced their second supplement (Attached hereto as
9 Exhibit J) to their expert disclosure in which Defendant's expert maintained his
10 previous opinions stating:

11
12
13 Subject / Post Records:

14 2/11/2013 - Patient Questionnaire - Prosthetic Center of Excellence.

15 2/12/2013 - 2/20/2013 - Exam Notes - Prosthetic Center of Excellence.

16 IMPRESSION:

17 The above records do not change the opinions of my prior report. The claimant had very similar
18 symptoms years ago after a work injury in 1999. At that time, the claimant was thought to be
19 exaggerating her complaints.

20 The above conclusions have been made to a reasonable degree of medical probability and are
21 based on the available records.

22 On May 3, 2013, Defendant deposed the Plaintiff in this matter in which
23 questions were asked and answered specifically related to her surgery and
24 continued treatment. Further, on June 27, 2013, Defendant deposed Plaintiff's
25 spinal surgeon Dr. Smith. As Defendant had the opportunity to conduct an
26 independent medical examination, retain an expert to dispute the need and
27 relatedness of Plaintiff's surgery, and conduct depositions of plaintiff and her
28

1 spinal surgeon, contrary to Defendant's position there is no prejudice to
2 defendant from the inclusion of the supplemental billing and records.

3 It is unlikely the one page billing statement from surgery center of
4 Southern Nevada would alter Defendant's opinion rendered that the surgery was
5 neither related to the incident nor was it necessary. Should the Defendant wish
6 to allow their expert to produce a 3rd supplemental report based on the additional
7 records Plaintiff would not object.
8

9 **2. DEFENDANT IS NOT SURPRISED**

10 As discussed previously, Plaintiff has continually supplemented her
11 disclosures to Defendant, including putting Defendant on notice of her lumbar
12 surgery before the operation. Further, as Defendant is already aware, Plaintiff is
13 still recovering from her surgery, still experiencing pain, and still undergoing
14 treatment related to the injuries sustained as a result of her slip and fall on
15 Defendant's premises
16

17 Defendant had knowledge that Plaintiff required surgery well before any
18 deadlines. Defendant had the opportunity to retain an expert (who reviewed the
19 medical records including her surgical records), had Plaintiff undergo an
20 independent medical examination, had executed medical authorizations, and
21 conducted the depositions of plaintiff and her surgeon. The inclusion of a bill
22 from the surgical center of Nevada (whose records had already been provided)
23 should come as no surprise to Defendant as they already had in their possession
24 the operative report from the surgical facility.
25
26
27
28

1 In Defendant's motion, Defendant asserts;

2 "Additionally, at no time prior to the close of discovery, did Plaintiff provide
3 any damages information to support he doubled future medical expenses
4 claim she surprised Wal-Mart with on August 6, 2013." (MTN pg 8 25-27)
5

6 This is an attempt to misconstrue the facts. At issue is Plaintiff's August 6,
7 2013, disclosure of \$116,929.35 related to a single paged bill from the Surgery
8 Center of Southern Nevada, relating to the surgery center's fees for plaintiff's
9 operation. The records and bills from her surgeon, the records and bills from her
10 pre operative clearance, the operative report and records from surgery center of
11 southern Nevada, and the records from her follow up visits to her spinal surgeon
12 had been previously disclosed to Defendant. Further, Plaintiff had received
13 treatment at the Surgery Center of Southern Nevada prior to her surgery, the
14 records and bills which were all properly and timely disclosed to Plaintiff.
15

16 Defendants cite to *Baltodano v Wal-Mart Stores* in support of its assertion
17 that Plaintiff's disclosures should be stricken. However, unlike in the case at
18 hand, Plaintiff's computation of damages in *Baltodano* did not contain any
19 information or details about Plaintiff's spinal surgery. Only after the deadline for
20 expert disclosures did Plaintiff provide notice to defendants of Plaintiff's
21 upcoming spinal surgery.

22 In *Baltodano*, Plaintiff failed to provide any computation of damages
23 related to Plaintiff's \$400,000 surgical requirements until after the deadline for
24 expert disclosures. As a result Wal-Mart could not obtain expert testimony
25 regarding the surgery and the relatedness of such, and was unable to conduct an
26 Independent Medical Examination. In the instant case, Plaintiff provided the
27 surgeon's records and bills and operative report and Defendants were able to
28

1 obtain an Independent Medical Examination before the deadline to disclose
2 experts.

3 "Here, Harris' computation of damages failed to include Baltodano's spinal
4 fusion surgery and led Wal-Mart to believe that no such damages were
5 being sought. Harris' failure to timely disclose the fact that Baltodano was
6 contemplating surgery is neither substantially justified or harmless
7 (*Baltodano v. Wal-Mart Stores, Inc.*, 2011 U.S. Dist LEXIS 98306 (D. Nev.
8 Aug. 31, 2011))
9

10 The court ruled against *Baltodano* because the disclosure was not made
11 sufficiently before the cut off date for expert disclosures to allow Wal-Mart time to
12 conduct needed discovery such as retain experts and conduct an independent
13 medical examination. In the instant case, Plaintiff provided ample notice and
14 documentation of Plaintiff's surgery.
15

16 Unlike in *Baltodano*, Defendant was not only on notice of Plaintiff's
17 surgery, but had the records and operative report related to the surgery, had
18 sufficient time to retain an expert to refute Plaintiff's need for the surgery,
19 including preparing two supplemental expert reports, had Plaintiff undergo and
20 Independent medical examination, and had the opportunity to depose Plaintiff
21 and her surgeon.
22

23 In the instant case, the surprise to the defendant of the supplemented
24 disclosure(s) is minimal. Defendant was aware that this matter was a surgical
25 case, was aware that the Plaintiff underwent a lumbar surgery on February 20,
26 2013, and was in receipt of Plaintiff's surgeon's billing, and the operative report
27
28

1 from the surgical center, and had the opportunity to obtain an independent
2 medical examination and depose Plaintiff's surgeon. Plaintiff in no way is
3 attempting to sandbag or surprise the Defendant; to the contrary, Plaintiff has
4 continuously supplemented her disclosures and providing the information
5 available to Defendant.
6

7
8 **B. ANY POTENTIAL HARM DEFENDANT HAS BEEN CURED**

9 The district court has wide latitude in using its discretion to issue sanctions
10 under FED. R. CIV. P. 37(c)(1). Yeti by *Molly, Ltd. v. Deckers Outdoor Corp.*, 259
11 F.3d 1101, 1106 (9th Cir. 2001).
12

13 Excluding the billing records associated with the previously disclosed
14 operative report from surgical center of Southern Nevada will cause extreme
15 harm to Plaintiff and is too harsh of a sanction. By supplementing her 26(f)
16 disclosures to include the billing related to the operative report previously
17 provided, Defendant has in its possession everything relating to her surgery, well
18 in excess of trial. If Defendant wishes to retain additional experts based upon the
19 supplemented records including the surgical center billing, Plaintiff would not
20 object. If the Defendant wishes to re-open discovery on damages Plaintiff would
21 not object.

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

1 **C. THERE WILL BE NO DISRUPTION TO TRIAL**

2 The crux of the issue at trial regarding damages will be the need of
3 Plaintiff to undergo surgery at all, and the causation and relatedness between her
4 fall and the surgery. Defendant's position (and their retained expert) is that
5 Plaintiff's need for surgery was NOT the result of her fall at Defendant's
6 premises, that Plaintiff had pre-existing injuries, and plaintiff's surgery was not
7 reasonable treatment based upon her injuries.
8

9 The inclusion of the surgical center's bill does not alter or change the
10 positions of either side. Plaintiff underwent surgery that Plaintiff asserts is related
11 to the fall. Defendants assert the surgery was neither needed nor resulting from
12 injuries sustained from her fall.

13 In the instant case, Defendant has retained an expert who completed a
14 total of three reports, all of which in support of the position Plaintiff's surgery was
15 unrelated to the fall.
16

17 **D. NO BAD FAITH OR WILLFULLNESS**

18 In *Shakespear v Wal-Mart* cited by defendants, the plaintiff excluded
19 evidence regarding her future surgery and future medical expenses. In that
20 matter Wal-Mart was surprised with the disclosure of \$228,000 in future medical
21 expenses related to surgery that would be required. Shakespear had
22 continuously represented to Wal-Mart that she had ceased all medical treatment.
23 On the deadline for disclosing expert witnesses, Shakespear for the first time
24 included claimed future medical expenses.
25

26 Moreover, Shakespear had failed to disclose to Wal-Mart the fact that she
27 had retained two experts to opine to the causation of injury, and the
28

1 reasonableness and appropriateness of past medical care and expenses. Not
2 only did Shakespear fail to disclose the experts but further failed to disclose that
3 she had underwent an Independent Medical Examination with her retained
4 experts on August 5, 2012, August 22, 2012, and September 5, 2012. After the
5 medical examination, Shakespear made supplemental disclosures on August 14,
6 2012, September 27, 2012, December 21, 2012, and February 14, 2012, each
7 time stating "she had not retained or specially employed experts to provide
8 expert testimony." The court ruled against Shakespear stating, "Wal-Mart was
9 sandbagged when Plaintiff disclosed opinions about the need for future knee
10 surgery and future medical expenses exceeding \$228,000 on the last day to
11 disclose experts."
12
13

14 In *Shakespear*, Wal-Mart was surprised by the disclosure, surprised by the
15 existence of two retained experts that would opine to her need for future surgery,
16 and genuinely prejudiced by Plaintiff's intentional and willful actions.
17

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IV. CONCLUSION

The late disclosure of the surgical center's bill did not put Defendant on notice that Plaintiff was surgical, Defendant conducted its discovery with the full knowledge that Plaintiff underwent surgery, was aware the surgery center of Southern Nevada performed the surgery, defendant retained an expert and conducted depositions in support of its position that the surgery was unrelated to the fall and ultimately not medically necessary nor related to the incident anyway.

RESPECTFULLY SUBMITTED THIS 30 day of October, 2013

BERNSTEIN AND POISSON



SCOTT POISSON, ESQ.

Nevada Bar No.010188

JAMIE H. CORCORAN, ESQ.

Nevada Bar No.: 11790

BERNSTEIN & POISSON

320 South Jones Blvd.

Las Vegas, Nevada 89107

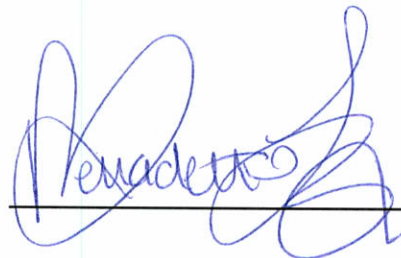
(702) 256-4566

(702) 256-6280 fax

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am over the age of eighteen years and I am an employee of Bernstein and Poisson. On the 30 day of October, 2013, a true and correct copy of the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO EXCLUDE PLAINTIFF'S UNTIMELY DISCLOSED DAMAGES** was sent to all interested parties, via CM/ECF addressed below.

PHILLIPS, SPALLAS & ANGSTADT LLC
504 South Ninth Street
Las Vegas, Nevada 89101
(702) 938-1510 (phone)
(702) 938-1511 (fax)
Attorneys for Defendant
Wal-Mart Stores, Inc.

A handwritten signature in blue ink, appearing to read "Bernstein & Poisson", is written over a horizontal line.

An Employee of BERNSTEIN & POISSON